IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

JOSEPH DENNY NEZPERCE, Petitioner, vs. JIM SALMONSEN; ATTORNEY GENERAL OF THE STATE OF MONTANA, Respondents.	Cause No. CV 22-57-BU-BMM ORDER

This case comes before the Court on Petitioner Nezperce's application for writ of habeas corpus under 28 U.S.C. § 2254. Nezperce is a state prisoner proceeding pro se. He has not paid the $5.00 filing fee or moved to proceed in forma pauperis, but there is no need to delay resolution on that account.

Nezperce's claims involve the conditions of his confinement. *See* Pet. (Doc. 1) at 4, 8–11. Because he does not believe he is safe, he asks this Court to release him. *See, e.g.*, *id*. at 10.

Nezperce cannot litigate these claims in a habeas petition. "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016) (en banc) (quoting *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam)). Nezperce does not claim that his sentence has expired and does not challenge the validity of

the conviction or sentence underlying his current custody. His allegations do not lie at the heart of habeas corpus.

Nezperce contends, in effect, that when conditions of confinement pose a threat to personal safety, release from custody is the only appropriate remedy. But, under certain stringent circumstances, release may be available as a remedy under 42 U.S.C. § 1983 for proven, persistent, and uncorrected constitutional violations. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 499–502 (2011); 18 U.S.C. § 3626(a)(3). In the vast majority of cases, measures short of release—reclassification or transfer, an award of damages, declaratory judgment, or the like—will adequately remedy such violations. But every action under § 1983 entails a remote possibility that release *might* be available. That fact does not make § 1983 actions and habeas petitions equivalent or interchangeable. The Ninth Circuit holds that they are mutually exclusive. *See Nettles*, 830 F.3d at 927–31.

Because Nezperce's claims do not "lie at the core of habeas corpus," they "must be brought, if at all," in a civil complaint under 42 U.S.C. § 1983. *Nettles*, 830 F.3d at 931 (internal quotation marks and citations omitted).

Section 1983 may involve different exhaustion requirements and does involve a different filing fee. It is not clear whether Nezperce would name the Respondents to the petition as the Defendants in a § 1983 action. Nezperce's allegations do not suggest that a time bar is imminent. Rather than converting this

action to a § 1983 action, *see Nettles*, 830 F.3d at 936 (court "may" convert the petition if, among other things, "it names the correct defendants"), the Court will dismiss the petition. If Nezperce wishes to proceed under § 1983, his filing history shows that he knows how to do so. He has filed five actions under § 1983, four of them in 2022.

A certificate of appealability, *see* 28 U.S.C. § 2253(c), is not warranted. Nezperce's allegations do not provide room for reasonable debate about their nature. *See Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The disposition is controlled by *Nettles*.

Accordingly, IT IS ORDERED:

1. Nezperce's petition (Doc. 1) is DISMISSED.

2. A certificate of appealability is DENIED.

3. The clerk shall enter, by separate document, a judgment of dismissal.

DATED this 22nd day of August, 2022.

Brian Morris, Chief District Judge
United States District Court